

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

ADAM JAMARIAN MARKELLE SILLS, *Petitioner,*

v.

THE HONORABLE LINDSEY COATES, of the SUPERIOR COURT OF
THE STATE OF ARIZONA, in and for the County of MARICOPA,
Respondent Commissioner,

STATE OF ARIZONA, *Real Party in Interest.*

No. 1 CA-SA 21-0217
FILED 2-3-2022

Petition for Special Action from the Superior Court in Maricopa County

No. CR2021-137621-001

CR 2021-140683-001

The Honorable Lindsey G. Coates, Judge *Pro Tempore*

JURISDICTION ACCEPTED AND RELIEF DENIED

COUNSEL

Apfel Law Group, Phoenix
By Seth M. Apfel
Counsel for Petitioner

Maricopa County Attorney's Office, Phoenix
By Jeremy D. Miller, Juli S. Warzynski, Douglas Gerlach
Counsel for Real Party in Interest

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OPINION

Presiding Judge Randall M. Howe delivered the opinion of the court, in which Judge Brian Y. Furuya and Judge Michael J. Brown joined.

H O W E, Judge:

¶1 Adam Jamarian Markelle Sills petitions for special action relief from the trial court’s ruling vacating his bail eligibility hearing without prejudice to setting the hearing at a later time. Although the trial court was ready to proceed with the hearing, Sills’s counsel objected, arguing that because Sills had been found incompetent to stand trial in a separate pending criminal proceeding, Sills was unable to assist counsel at the bail hearing. Counsel argued that proceeding with the bail hearing while Sills was incompetent and undergoing treatment to restore his competency would violate his due process rights.

¶2 The issue before us is whether due process prohibits a trial court from conducting a bail hearing when the defendant is undergoing competency restoration treatment. We accept jurisdiction because Sills has no adequate remedy by appeal, and this is an issue of first impression and statewide importance. *Segura v. Cunanan*, 219 Ariz. 228, 233 ¶ 16 (App. 2008); *Robinson v. Hothman*, 211 Ariz. 165, 168 ¶ 8 (App. 2005). We deny relief, however, because a trial court does not violate a defendant’s due process by conducting a bail eligibility hearing while the defendant is undergoing competency restoration treatment.

FACTS AND PROCEDURAL HISTORY

¶3 In 2020, while on probation for a 2018 felony conviction, Sills was charged with attempted robbery, found bailable, and released. Because he displayed cognitive issues, he underwent a psychological evaluation in early 2021. Doctors determined that he was born with Fetal Alcohol Syndrome and has an intellectual disability. Defense counsel then moved for a competency evaluation of Sills to determine whether he was competent to stand trial under Arizona Rule of Criminal Procedure (“Rule”) 11. The superior court appointed doctors to examine Sills’s competency, vacated all pending dates, and affirmed release orders for the 2018 and 2020 cases. Based on the doctors’ reports, the court found that Sills was “unable to understand the nature of the proceedings [and was] unable

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to assist counsel in [his] defense,” but that his competency could be restored within 15 months. The court also found that Sills was not “incompetent to refuse treatment,” “confinement [wa]s not necessary for treatment,” and “[he wa]s not a likely threat to public safety.” The court consequently ordered that Sills undergo outpatient competency restoration treatment. In October 2021, Sills was arrested for burglary in the third degree, criminal trespass, and theft of means of transportation. He was found bailable and released. The court transferred the case to the superior court’s Rule 11 commissioner for another competency evaluation and affirmed the prior release orders.

¶4 Proceedings in this case began later that month when Sills was arrested for possession of dangerous drugs and kept in custody because he was on felony release at the time of the offense. Defense counsel moved to consolidate the latest case with Sills’s other cases under Rule 11 and vacate the preliminary hearing. He also moved in part to set bail. He argued that Sills had a due process right to be on pretrial release and receive restoration treatment in the least restrictive environment, but that conducting a bail eligibility hearing while he remained incompetent violated his due process rights. Counsel argued that his bail eligibility should be determined as part of the Rule 11 proceedings by the Rule 11 commissioner, who was already considering counsel’s motion to consolidate this case with Sills’s previous cases. Counsel also argued that his bail eligibility should be governed by A.R.S. § 13-4512, addressing competency restoration treatment, and not Arizona Constitution article 2, section 22, addressing bailable offenses.

¶5 The court began a bail eligibility hearing under Rule 7.2(b)(4) in November 2021 but did not set bail that day. Sills did not appear for medical reasons, and the court waived his appearance. The court declined to address the consolidation motion, deferring to the Rule 11 commissioner for a ruling on that motion. In response to defense counsel’s motion, the court offered to either set the bail hearing in the next few days or to continue the hearing. Defense counsel objected to continuing the hearing because counsel did not have Sills’s permission to do so. But counsel also objected to proceeding with the hearing because Sills was incompetent and unable to assist in his defense. He added that the Rule 11 court, rather than the trial court, should address bail because Sills was already undergoing restoration. The court declined defense counsel’s request to set a bail pursuant to A.R.S. § 13-4512 and vacated the bail eligibility hearing without prejudice, explaining that defense counsel could inform the court when Sills is prepared to proceed with the hearing. This special action followed.

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DISCUSSION

¶6 Sills argues that (1) all proceedings must be suspended once a defendant is declared incompetent but restorable; and (2) even if the bail eligibility hearing is not suspended, holding the hearing while he remains incompetent but restorable would violate his due process rights. He also contends that the trial court should have considered his release under A.R.S. § 13-4512. We review constitutional issues and interpret statutes and rules de novo. *State v. Godoy*, 244 Ariz. 327, 328 ¶ 7 (App. 2017); *State v. Florez*, 241 Ariz. 121, 127 ¶ 21 (App. 2016). Contrary to Sills’s arguments, due process does not require that bail hearings be suspended while an incompetent defendant is undergoing restoration treatment.

¶7 Sills argues that all proceedings related to his criminal prosecutions are suspended until he is restored to competency. Competency proceedings, however, “shall not delay” determinations of a defendant’s bail eligibility. A.R.S. § 13-4507(C). Due process allows ancillary matters – such as proceedings pending trial – to proceed during a defendant’s temporary incompetency. *Jackson v. Indiana*, 406 U.S. 715, 740-41 (1972). Sills relies on *State v. Silva*, which noted that a defendant cannot be tried, convicted, or punished if he is unable to understand the proceedings or assist in his defense. 222 Ariz. 457, 460 ¶ 14 (App. 2009). But the trial court here did none of those things; it merely offered to hold a bail eligibility hearing under Rule 7.2(b)(4).

¶8 Without addressing the “shall not delay” mandate of A.R.S. § 13-4507(C), Sills also argues that even if all proceedings are not suspended during a defendant’s period of incompetency, due process does not allow the trial court to conduct a bail eligibility hearing while a defendant is unable to assist his counsel at the hearing. His contention in effect challenges the constitutionality of the statute. His challenge fails because a trial court does not violate the due process rights of a defendant by conducting a bail eligibility hearing while a defendant is deemed incompetent but restorable.

¶9 The State may not deprive a person of “life, liberty, or property without due process of law,” U.S. Const. amend. XIV; Ariz. Const. art. 2, § 4, and the “fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner,’” *Samiuddin v. Nothwehr*, 243 Ariz. 204, 211 ¶ 20 (2017) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)). Arizona courts satisfy due process in determining whether a defendant should be released on bail by conducting a “full and adversarial evidentiary hearing” as provided by

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Rules 7.2(b)(4) and 7.4(b). *Simpson v. Owens*, 207 Ariz. 261, 265 ¶ 12, 270 ¶ 27 (App. 2004). The occurrence of the “full and adversarial evidentiary hearing” does not depend on whether the defendant is competent to stand trial at the moment of the hearing, however. Due process “is flexible and calls for such procedures as the particular situation demands.” *Samiuddin*, 243 Ariz. at 211 ¶ 20 (quoting *Mathews*, 424 U.S. at 334). In determining whether due process requires a particular safeguard, Arizona courts consider three factors set forth in *Mathews*: (1) the private interest affected, (2) the risk that that interest would be erroneously deprived without the additional safeguard and the value of the additional safeguard, and (3) the government’s interest. 424 U.S. at 335.

¶10 Sills unquestionably has an important interest at stake in how the bail eligibility hearing is conducted: his liberty pending his treatment and criminal proceedings. *See Simpson*, 207 Ariz. at 267 ¶ 17; *see also Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) (“Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action.”). The State likewise has important interests in detaining Sills for public safety and ensuring that he is present at trial, regardless of his competency. *See* A.R.S. § 13-3961(B)(1), (3); *see also* A.R.S. § 13-4507(C); *Bell v. Wolfish*, 441 U.S. 520, 534 (1979) (The State has a “substantial interest in ensuring that persons accused of crimes are available for trials and, ultimately, for service of their sentences, or that confinement of such persons pending trial is a legitimate means of furthering that interest.”). These interests can outweigh Sills’s fundamental liberty interest. *See Simpson*, 207 Ariz. at 267 ¶ 17.

¶11 The crux of the analysis, then, is the extent of the risk of erroneous deprivation of Sills’s liberty if his bail eligibility hearing is conducted before he has been restored to competency. The answer is that the risk is low because his ability to fully participate in the hearing is not crucial. Although a bail hearing is “inherently similar to a preliminary hearing,” *Segura*, 219 Ariz. at 235 ¶ 29, it is less formal, Wayne R. LaFave et al., *Proof at a Bail Hearing*, 4 Crim. Proc. § 12.1(d) (4th ed.) (Dec. 2020 update). The purpose of a bail eligibility hearing is not to determine a defendant’s guilt, *Simpson*, 207 Ariz. at 275 ¶ 42, because it is “not a wide-ranging one for discovery, nor for exploration or determination of guilt or innocence,” *id.* (quoting *State v. Kastanis*, 848 P.2d 673, 676 (Utah 1993)). Here, the pertinent issues at a bail hearing would be whether Sills was on release from an earlier felony charge and whether “the proof is evident or the presumption great” on the present charge. Ariz. Const. art. 2, § 22; Rule 7.2(b)(1)(B). Counsel can review witness statements, call witnesses, and cross-examine the State’s witnesses on those issues. *See* Rule 7.4(b).

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¶12 Sills’s counsel claims that because Sills is currently incompetent to stand trial, he cannot assist counsel at the hearing. But nothing in the record before this court shows that Sills cannot attend the bail hearing or advise counsel on the facts of the case as he believes them to be. The nature of a bail eligibility hearing is so narrow and the determinations that the court must make in determining release are so limited, *see supra* ¶ 11, that a defendant need not be fully competent to assist at the hearing, *see Commonwealth v. Torres*, 806 N.E.2d 895, 899–900 (Mass. 2004) (incompetent-but-restorable defendant was not so unable to understand proceedings that he could not assist counsel; “[i]ncompetency to stand trial does not equate to the complete inability to communicate basic information to counsel on a narrow range of fact-specific issues.”). Sills has not shown how requiring him – or any defendant – to be fully competent to stand trial before a bail eligibility hearing may proceed would significantly enhance the trial court’s determination on bail.

¶13 Moreover, a defendant’s competence does not necessarily bear on whether the defendant will appear for trial. In fact, requiring a defendant to be competent will result in having his bail eligibility proceedings erroneously delayed or in having those qualified for bail to be erroneously detained. In this way, the risk of erroneous deprivation would increase if a bail hearing was delayed pending a pretrial defendant’s participation in restoration services. Therefore, under the *Mathews* factors, Sills was not deprived of due process when the trial court vacated the bail eligibility hearing until he is prepared to proceed with the hearing.

¶14 The Massachusetts Supreme Judicial Court faced this identical issue and held that the trial court could conduct a bail eligibility hearing for an incompetent-but-restorable defendant without “per se violat[ing] that defendant’s due process rights.” *Torres*, 806 N.E.2d at 896, 901. It analyzed the three *Mathews* factors similarly and found that the risk of erroneous deprivation was lower considering the “specific nature of the bail hearing” and the “extent and nature” of the defendant’s incompetency. *Id.* at 899.

¶15 Other states have come to a similar conclusion and likewise concluded that bail hearings need not be postponed until a defendant is restored to competency. *See Hodai v. City of Tucson*, 239 Ariz. 34, 42 ¶ 25 n.8 (App. 2016) (“[O]ur courts may look to cases from other jurisdictions as persuasive authority.”). In Florida, defendants deemed incompetent but restorable to stand trial may be released on appropriate conditions. Fla. R. Crim. Proc. 3.212(c)(1), (d) (2021); *Marino v. State*, 277 So.3d 219, 221 (Fla. Dist. Ct. App. 2019) (noting that such individuals are presumed innocent

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and “cannot be denied pretrial release based solely on [their] incompetence to proceed”). In Colorado, the court “shall” consider releasing a defendant deemed incompetent but restorable if the defendant is in custody and recommended for outpatient restoration treatment. Colo. Rev. Stat. § 16–8.5–111(2)(b)(II)(A) (2020); *see also People v. White*, 819 P.2d 1096, 1097 (Colo. App. 1991) (holding that Colo. Rev. Stat. § 16–8–112, the predecessor to § 16–8.5–111, did not preclude the release of an incompetent defendant charged with a violent crime). In Illinois, the court may release a non-dangerous defendant deemed incompetent but restorable, but the court must select the least physically restrictive treatment: either on an inpatient or outpatient basis. 725 Ill. Comp. Stat. 5/104–17 (2018); *People v. Lang*, 391 N.E.2d 350, 358 (Ill. 1979).

¶16 Other states and the District of Columbia have enacted statutes and rules authorizing courts to set bail and release for treatment incompetent-but-restorable defendants who have been charged with a felony. *See* Ala. R. Crim. P. 11.6(c)(3)(ii) (2000); Conn. Gen. Stat. § 54–56d(h)(1), (i) (2019); D.C. Code Ann. § 24–531.02(b) (2005); Haw. Rev. Stat. § 704–406(1) (2020); Me. Rev. Stat. tit. 15, § 101–D(5)(B) (2021); Md. Code, Crim. Proc. § 3–106(b) (2018); Mich. Comp. Laws § 330.2036 (1975); Minn. R. Crim. Proc. 20.01, subd. 3(c) (2018); Nev. Rev. Stat. § 178.425(2), (3) (2017); N.H. Rev. Stat. § 135:17–a(II) (2019); N.J. Stat. § 2C:4–6(b) (1999); N.M. Stat. § 5–602.1(E) (2019); 50 Pa. Cons. Stat. § 7403(d) (1996); R.I. Gen. Laws § 40.1–5.3–3(e) (2012); S.D. Codified Laws § 23A–10A–4 (2020); Tex. Code Crim. Proc. Art. 46B.072(a–1)(1) (2017); Vt. Stat. Ann. tit. 13, § 4815(g)(3)(A) (2012); Wash. Rev. Code § 10.77.060(1)(f) (2021); W. Va. Code § 27–6A–7 (1974); *cf.* Cal. Penal Code § 1370.1(a)(1)(B)(iii) (2019); Kan. Stat. § 22–3302(3)(A) (2018); Mo. Ann. Stat. § 552.020(5) (2018); Wis. Stat. § 971.14(2)(am), (b) (2018). None of these provisions have been deemed unconstitutional, and Arizona’s procedure is consistent with them.

¶17 Sills nevertheless argues that A.R.S. § 13–4512 should govern his release conditions. But A.R.S. § 13–4512 gives the superior court authority to order a defendant to undergo competency restoration treatment, either while out of custody or confined in a treatment program. It does not address bail eligibility at all and is thus not the relevant authority for this determination. The trial court correctly declined to apply A.R.S. § 13–4512 and followed A.R.S. § 13–4507(C) so as not to delay his bail eligibility hearing under Rule 7.2(b)(4). This did not violate Sills’s due process rights, and we consequently deny relief on his petition.

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CONCLUSION

¶18

For these reasons, we accept jurisdiction but deny relief.



AMY M. WOOD • Clerk of the Court
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